


Memorandum

Attorney-Client Privileged

To: Town of Colchester
From: Brian P. Monaghan, Esq. 
Date: July 27, 2017
Re: Town Maintenance of Private Roads

According to geographic information system (GIS) data, the Town of Colchester maintains approximately 14 miles of private roads, in addition to maintaining approximately 92 miles of public highways. Specifically, the Town's highway crews plow snow on those private roads, but do not maintain road surfaces or repair culverts and bridges. This practice continues even though the roads are 1) located on private property; 2) not classified as Town highways; 3) the Town has never taken any official action to accept them as Town highways; and 4) the Town does not list them on its Agency of Transportation Town Highway Map, and thus does not collect State aid for highway monies for these roads. While we have marked this memorandum as "Attorney-Client Privileged," it is up to the Selectboard whether to release it for public review.

The question we have been asked to review is whether the Town of Colchester should continue its historic practice of plowing these private roads. We realize we are wading into a serious and ongoing public policy question for Colchester residents and the Town of Colchester government. The Selectboard and the voters have been discussing this for more than forty years, and it appears this practice has been continuing for at least as long. Nevertheless, the short answer we recommend is that the Town cease maintaining private roads. Alternatively, the Selectboard might consider whether to convert these roads from private to public, if the road users can meet the necessary Town standards (e.g., the Department of Public Works Specifications and Standards, which govern highway standards in Colchester).

Here are some of the initial issues that come up in considering this practice:

1. Vermont municipalities can only exercise those functions that are necessary and authorized by Vermont law, the so-called "Dillon's Rule." It is not crystal clear that the Town's Charter provision on private roads confers sufficient authority to plow private roads, or whether that provision would withstand legal scrutiny;
2. Certain residents or property owners are clearly receiving special treatment from the Town, while other residents or property owners are not entitled to the same special benefits. This is a situation where a certain class of people is benefited, and it is very obvious, because residents can readily watch a Town snowplow out plowing private roads. Accordingly,

this scenario is one where the unequal treatment creates a significant appearance-of-conflict problem for the Town, because the special benefit is literally in taxpayers' faces;

3. It requires taxpayers to spend tax dollars for the maintenance of private roads that they are not permitted to use;
4. The practice arguably confers a public benefit on private users in violation of Chapter I, Article 7 of the Vermont Constitution;
5. The Town is unable to collect State aid for the roads that it is maintaining;
6. While the Town is not collecting payments for this maintenance work, it is arguably competing with the private sector by doing work that private snowplow operations might do, all while enjoying the benefits that come with being a tax-exempt governmental entity, entitled to preferential borrowing terms (such as bonding and other favorable financing options);
7. These maintenance activities may or may not be covered under the Town's liability indemnity coverage policy with VLCT-PACIF, Inc. (PACIF), which places general fund tax dollars at risk; and
8. The Town may be negating its sovereign immunity for torts which occur while engaged in private road maintenance, which also places tax dollars at risk.

Legal Authority to Maintain Private Highways

Vermont general law requires that a Vermont municipality: "keep its class 1, 2, and 3 highways and bridges in good and sufficient repair during all seasons of the year...." 19 V.S.A. § 310(a). There is no general legal authority that requires or authorizes a Vermont municipality to maintain private highways. Vermont jurisprudence recognizes the so-called "Dillon's Rule," which creates a presumption against finding a grant of power to a municipality. *City of Montpelier v. Barnett*, 2012 VT 32, ¶ 46. "The general rule is that the charter of a municipal corporation is to be strictly construed against it; the presumption being that the Legislature granted in clear and unmistakable terms all that it intended to grant [...] if any fair, reasonable, substantial doubt exists concerning [a grant of power], it must be resolved against the [municipality], and its power denied." *Id.* If we were looking solely at Vermont general law, there is clearly no grant of legislative authority for a municipality to maintain a private highway. Accordingly, there may well be a Dillon's Rule problem here.

In contrast to Vermont general law, the Town's Charter authorizes the Town to: "establish a policy whereby the Selectboard may determine it to be in the public interest to plow those private roads serving two or more year-round residences,

which had previous to January 1, 1997, have the Town providing winter road maintenance.” 24A V.S.A. § 113-104(7). This language is not classic statutory enabling language, and is not a very clear grant of power to maintain private roads. We can only expect that the language in the Charter was the product of a compromise. In the search for certainty as to enabling powers, this language does not appear to make the grade, as it is a very roundabout way of conferring authority, and at most, it confers on the Selectboard the authority to *adopt a policy*. It does not state, “the Town is authorized by law to maintain private highways.” Moreover, our understanding is that the Selectboard has never exercised the purported Charter authority to adopt such a policy. Beyond the question of the effectiveness of this language, we have concerns about whether this Charter provision meets the requirements of the Proportional Contribution Clause of the Vermont Constitution, as further outlined below.

Currently, the Town’s existing practice is to maintain certain private roads. To our knowledge, this practice has been in effect since the early 1970s. Of course, we understand the concerns that, because the Town has been doing this for so long, it has become effectively a “precedent” that cannot be reversed. We also understand the argument that people have built homes on these roads on the expectation that the Town would continue its practice of plowing the road into the future. Nevertheless, we see no legal basis for the argument—or even the belief—that the Town would plow private roads forever. We also understand that the Town has a Snow and Ice Removal Plan (adopted by the Selectboard on July 9, 2013) that mentions private roads, and characterizes private roads as part of the Town’s “transportation system.” The Plan goes on to address its goals and objectives with respect to removing snow and ice from the entire transportation system, and does not differentiate between public or private roads. The only differentiation is between major arterial roads and secondary roads, with no delineation between private or public. To be clear, the Plan is not etched into granite; rather, it is a policy the Selectboard adopted, presumably with several goals in mind: to ensure for its citizens that their roads will be plowed, on an efficient basis, and to set expectations so that citizens and Department of Public Works staff can be on the same page through the issuance of the Plan. Nevertheless, the Plan is subject to change, and if the Selectboard sees fit to change the Plan, it is entitled to do so. The Plan is not a Town ordinance, it is not part of the Town’s Charter, it is not required by law, and it can be changed by the Selectboard by resolution at any properly-warned meeting.

The Appearance of Preferential Treatment

Certainly there are private roads in Colchester where the property owner hires a contractor to plow snow in winter. These folks can look to the Town’s similar work on other private roads and say, “why not us?” Even without examining the reasoning behind the Town’s practice, it looks to outsiders that certain property owners are entitled to special treatment, while others are not. Without a rational policy basis, the Town has implemented a policy choice to prefer some residents

over others. There is no reason for us to believe there is any illegal discrimination occurring, based on the facts we have seen, but the possibility for such a claim exists. At the end of the day, this practice benefits property owners on private roads, at the expense of property owners on public roads. Further, it results in a business advantage for those businesses lucky enough to have free private road maintenance, and a competitive disadvantage for the business that pays for its own road maintenance.

Spending Taxpayer Dollars to Benefit a Private Purpose: Taxpayer Fairness

The general rule is that public highways must be open to anyone, irrespective of where they live, so long as they comply with rules for the use of the highway. Meaning, anyone can use a public highway, and the Town lacks the power to preclude anyone from using it, such as non-residents. Here, Town taxpayers are paying for maintenance of private property, and taxpayers derive no direct benefit, yet they are actually precluded from using those highways because they are private property. There may be signs on these private roads that are as simple as a “private road” sign, all the way up to a “do not enter” sign. The effect is that taxpayers are charged for conferring a benefit on a select few. This is not to say that the Town can never collect taxes that end up benefiting a different portion of residents than those who pay the taxes; in this case, however, one can state broadly that those who obtain the benefit should be paying for the direct cost of the benefit, and should not be able to exclude others from enjoyment of that benefit.

Conferring a Public Benefit on Private Users

This problem is a direct extension of the prior issue: that private users should not receive a tax dollar benefit that is greater than what other taxpayers receive. From a public policy perspective, it is problematic on its face, because it appears to be “not fair.” But it is also likely a constitutionally infirm practice, as the Vermont Constitution requires, “[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.” Vermont Constitution, Chapter I, Article 7.

In addition to the Vermont Constitutional provision, it is a generally accepted principal of American municipal law that “[t]he test of a public purpose should be whether the expenditure confers a direct benefit of reasonable general character to a significant part of the public, as distinguished from a remote or theoretical

benefit.” Eugene McQuillan, *Municipal Corporations* § 39.19, at 38 (3rd ed. 1995). In this case, it does not appear the Town is meeting this test.

State Aid for Town Highways

We expect that the amount of money the Town expends on plowing private roads is not a significant portion of the Town’s highway expenditures, so the Town would not necessarily save substantial tax dollars were it to stop the practice. Nevertheless, the Town is likely leaving money on the table that it could use to fund highway maintenance by omitting private roads from the VTrans public road inventory, which directly relates to state aid for highways. Vermont municipalities receive state aid from the State Transportation Fund for their class 1, 2, and 3 highways. If these Colchester private roads were public highways, they would likely be categorized as class 3. State law lays out the funding formula for class 3 town highways; “[f]ifty percent of the State’s annual town highway appropriation shall be apportioned to class 3 town highways. The apportionment for each town shall be that town’s percentage of class 3 town highways of the total class 3 town highway mileage in the State.” 19 V.S.A. § 301(a)(3). According to the 2016 Vermont Agency of Transportation Colchester Town Highway Map, the Town has 91.910 miles of public highway. We understand the Town receives approximately \$1,521 per mile in state aid for class 3 town highways. If the Town were to categorize 14 miles of private highway as public, it would increase the Town’s state aid take.

The law goes on to require that each municipality use these monies “solely for town highway construction, improvement, and maintenance purposes or as the nonfederal share for public transit assistance.” 19 V.S.A. § 301(a)(5). To the extent the Town is using state aid to purchase plow trucks, pay truck drivers, or purchase gravel which is then used on private roads, there is a concern that the practice is at odds with the requirements of state law, which places the Town at financial risk, and its board members at personal financial risk.¹

Competition with the Private Sector

In the 1970s, the Town of Hinesburg purchased a gravel pit that it used to supply the Town’s road crew with its necessary sand and gravel for winter road sanding and summer maintenance. The operation resulted in a \$30,000 annual profit for the Town, but the problem was that the Town was putting the local sand and gravel company out of business by undercutting prices and using the Town’s business advantages to its benefit. *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486 (1977). The analogy to *Hinesburg Sand and Gravel* is not exact; the Town of Colchester is providing snow plowing and maintenance

¹ “The members of the selectboard shall be personally liable to the State, in a civil action brought by the Attorney General, for making any unauthorized expenditures from money apportioned to the town under this section.” 19 V.S.A. § 306(a)(5).

services without collecting any payments. Accordingly, the Town of Colchester is market participant; though arguably only “partially.” However, the effect of this market participation is that local snowplow contractors are out of a job. The Vermont Supreme Court in *Hinesburg Sand and Gravel* held that maintaining a gravel pit “is both ‘incident’ and ‘subordinate’ to fulfillment of a town’s statutory duty,” but that selling 90% of its gravel was not incidental and was instead a “private business operation by the town, in direct competition with the plaintiff.” Here, the Town’s plowing of private roads is not a direct effort to establish a profit center for the Town by competing with private snowplowing operations. However, it stifles the private sector by taking away business that would otherwise be done by private businesses. It’s difficult to say whether a court would enjoin the Town’s private road snowplowing under *Hinesburg Sand and Gravel*, but it is clear that the practice is at least problematic under that case’s reasoning.

Liability Indemnity Coverage

I understand the Town presently maintains liability coverage through PACIF. The PACIF Coverage Document defines the Town as a “Named Member,” and extends the term “Member” to include,

not only the Named Member specified on the Declarations Page but also the following subject to all other terms, conditions, limitations and exclusions in this Coverage Document: (a) **Any official, trustee or employee of the Named Member while acting within the scope of that person’s duties as such**, and any person, organization, trustee, or estate listed as an additional covered party hereunder or to whom the Named Member is obligated by virtue of a Covered Contract to provide coverage under Section III-A. Agreement C such as is offered by this Coverage, and only in respect to operations by or on behalf of the Named Member.

PACIF Coverage Document at Section I-A(2)(a) (emphasis added). Meaning, PACIF provides coverage where the employee or officer was acting within the scope of his or her responsibilities when the loss occurred. In this instance, the Town has no statutory responsibility to maintain private roads. In fact, the Town may be prohibited from maintaining private roads for any of the foregoing reasons. The question then, is whether a plow truck operator who strikes another vehicle (regardless of fault) is acting within the scope of responsibility when that accident occurs. At best, that is an open question. At worst, the Town could find itself defending a lawsuit for negligence that would not be covered by PACIF. A rudimentary prediction is that the snowplow driver plowing a private road is acting outside the scope of his, and the Town’s, authority. Meaning, general fund dollars would be on the hook to pay both defense costs (attorney fees, experts, and court costs), and any damages, which could of course be significant.

While addressing this issue, it is worth noting that the Coverage Document includes at least two other sections that limit coverage to the scope of official action:

- Section III-E, Medical Payments Extension: “The Fund hereby agrees to pay medical expenses, as further described, for bodily injury **caused by an accident to Elected Officials and Volunteers while performing operations within the scope of their duties** for and on behalf of the Named Member.”
- Section V-A, Public Officials Liability Coverage Agreement Section 1, Agreement K: “The Fund hereby agrees, subject to the limitations, terms, and conditions hereunder mentioned, to: Indemnify and defend the Member for all sums which the Member shall become obligated to pay, all as more fully defined by the term Ultimate Net Loss, by reason of a Claim First Made against the Member during the Period of Coverage by reason of Wrongful Act(s) **while acting within the scope of the Member’s duties as such**, and only with respect to operations by or on behalf of the Named Member.” In essence, PACIF is stating here that it only provides coverage for wrongful acts that occur while an official is acting within the scope of his or her duties; all other acts will be excluded.

Following those coverage limitations, the Coverage Document provides one specific instance where PACIF will provide coverage where a Member is acting outside the scope of his or her duties: subject to certain limitations, PACIF agrees “to provide Good Samaritan liability coverage to Members, including employees, volunteers, fire fighters, rescue workers, and police, should they act outside the scope of their normal duties to assist someone who needs immediate help.” Section III-E, Good Samaritan Coverage Extension. This Good Samaritan protection is not broad enough to provide protection for a Town plow truck driver who has an accident with another driver on a private road.

Sovereign Immunity

Vermont municipalities are typically entitled to assert the affirmative defense of sovereign immunity in a lawsuit alleging negligence involving highway maintenance. *Dugan v. City of Burlington*, 135 Vt. 303, 304 (1977). Importantly, the right to assert the defense extends only so far as the governmental entity is exercising a genuine governmental function: “Governmental functions of a municipal corporation are those conferred or imposed upon it as a local agency, to be exercised not only in the interest of its inhabitants, but also in the advancement of the public good or welfare as affecting the public generally.” *Kedroff v. Town of Springfield*, 127 Vt. 624, 628–29 (1969). Meaning, where the local government is exercising a function that is

not expressly authorized by law, and it is not expressly for the benefit of the inhabitants of the community, the local government will not be entitled to assert the sovereign immunity defense in a negligence action. To be clear, the sovereign immunity defense continues to lose viability, as it is heavily disfavored from a public policy perspective, and to be frank, courts often find ways to avoid applying it. Nevertheless, it continues to exist in Vermont, and it should not be cast aside in this discussion, because it still provides useful protection from tort lawsuit, or as a defense in a tort lawsuit.

Whether the Town Charter Obligates the Town to Continue Plowing Private Roads

One of the questions we have been asked is whether there was an implied obligation on the part of the Town in proposing the 1997 Charter language that the Town would continue to plow certain roads. The answer to that is an unconditional “no.” While I do not know all the motivations in adopting the 1997 private roads language, or all the public communications on the issue, there was no legal requirement (such as landowner vested rights or promissory estoppel) on the Town in 1997, or today, to continue to provide landowners with a benefit that is arguably violative of the Vermont Constitution and contrary to sound public policy considerations.

Similarly, residents and property owners on Town-plowed private roads did not obtain any legally implied right to have continued plowing on their roads by virtue of anything the Town communicated to the public in 1997. While we see claims for promissory estoppel (essentially, a claim to enforce a broken promise) against municipalities on occasion, here, the Town never had the legal authority to plow those roads, and the affected parties have no legal right to make a promissory estoppel claim now on that basis.

Again, the Charter language authorizes the Town to, “establish a policy whereby the Selectboard may determine it to be in the public interest to plow those private roads serving two or more year-round residences, which had previous to January 1, 1997, have the Town providing winter road maintenance.” Our view is that, no matter what public communications there may have been on the issue, neither those communications, nor the Charter language itself, conferred any right on property owners to have the Town maintain their private roads.

Another question that has been raised is whether the Town is exposing itself to immediate legal liability if it decides to discontinue plowing, but allows a one year grace period for property owners and residents to procure contractors for the 2018-2019 plow season. There is no easy answer to this question, as it is a request to forecast the future. The Town has potential exposure if it: 1) stops plowing private roads now; 2) stops plowing private roads in a year; or 3) if it continues plowing private roads into the future. The more important question is whether there is more risk to remain with the status quo, or to change

immediately? Our view is that the biggest risk here is the potential for uncovered tort liability involving a Town highway vehicle. The sooner the Town stops the practice, the sooner it will mitigate that risk. It is entirely possible that a Selectboard decision to halt the practice will result in a lawsuit seeking an injunction to require that the Town continue the practice. In the scheme of things, that is a minimal risk when compared to the potentially astronomical exposure of liability in an uncovered tort claim.

Finally, there is the question about whether the Town should change the existing Charter language. My view is that it would be: 1) unnecessary at this juncture, because it does not obligate the Town to take any course of action; 2) resource-intensive to go through a town vote on an issue that is really within the purview of the Selectboard; and 3) a distraction for the Selectboard and administration in trying to effect good policy.

Options Moving Forward

There are several ways the Town could approach this issue, including: 1) ceasing all private road maintenance; 2) converting the private roads at issue to public highways; or 3) leaving the practice in place. We are certain each of these options carries possible risks and benefits. As much as some people will say that the Town has issued building permits to property owners for home construction on private roads, that does not make the situation acceptable; what it does is shift the burden of paying for that maintenance, and the vast potential liability associated with it, to the other residents of Colchester who are subsidizing those property owners. In addition, there would be substantial costs to upgrade private roads to Colchester's public highway standards.

One of the questions we have been asked is whether this is something that the Town should ask the voters to weigh in on. Our view is that the Selectboard form of government in Vermont is a representative form of democracy. The Town's voters elected the Selectboard members to make difficult decisions on their behalf. Vermont law does not have much in the way of direct voter referenda under our Constitution and our statutory framework. Vermont municipal voters typically only have authority to petition for a re-vote on a municipal budget (17 V.S.A. § 2661), petition for a "permissive referendum" to overturn a municipal ordinance (24 V.S.A. § 1973), or petition to overturn a municipal zoning regulation (24 V.S.A. § 4441(b)). In this instance, the value of a vote is that it would allow the Selectboard to take the temperature of the Town based on the outcome of the vote. Nevertheless, there are issues with that approach, including the fact that many voters may not come out to vote on the private roads question; it may only bring out "single issue" voters (e.g., residents and business owners on private roads that are currently plowed by the Town). On this particular issue, the voters have absolutely no direct authority to set municipal policy; only the Selectboard does. Our view is that the Selectboard is the only entity with authority to set policy on an issue such as this.

Conclusion

For all these reasons, we believe the Town should not be maintaining private roads. To recap:

- It is a troubling public policy because there are legal and policy reasons for the distinction between public and private roads, and the Town may not be authorized by Vermont law to plow private roads;
- The existing practice expressly confers special treatment on certain individuals;
- It exposes the Town to significant tort liability, in amounts that exponentially exceed the tax dollars that could be saved by stopping the practice;
- The Town may not be entitled to the traditional sovereign immunity affirmative defense in any negligence action;
- Losses may not be covered under the Town's liability indemnity coverage agreement with VLCT-PACIF;
- It may be costing the Town more than it should to maintain these roads, because of the lack of State aid; and
- It may violate the Proportional Contribution Clause of the Vermont Constitution.

Please let us know if you would like our further review of this issue.



VERMONT LEAGUE OF CITIES AND TOWNS

12½ MAIN STREET, MONTPELIER, VERMONT 05602
(802) 229-9111 FAX: (802) 229-2211

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April 13, 1995

Mr. Brian Osborne
Director of Public Works
Town of Colchester
P.O. Box 55
Colchester, CT 05446

Dear Mr. Osborne:

This letter is in response to your request for information on whether the town may provide winter maintenance on privately owned roadways. We advise that the town not engage in such activity because of the possibility of incurring additional liability and because, if challenged the court will likely determine that the town has no authority to do so.

In general, it is not permissible for the town to agree to plow private roadways, since it has been established that public funds are not to be utilized to confer a private benefit on an individual. See 17 V.S.A. 2664 and Van Sicklen v. Burlington, 27 Vt. 70 (1854). Lower courts have found that towns are without authority to plow private roads, in the absence of a some unique and compelling circumstances that rise to the level of a compelling interest. [for instance by removing a snow bank from private property which blocks the view at a public intersection] Therefore, unless there are public policy reasons for the action it would likely be considered beyond the authority of the town.

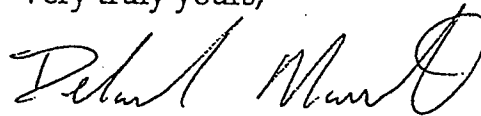
In addition, the municipality may not compete with the private sector by providing (at taxpayer's expense) a service to a private individual that would otherwise be purchased in the open market. 12 McQuillin, Mun. Corp. 36.02 (3rd ed). If a municipality is found to be performing a function which is commercial in nature and not incidental to an express function, the municipality may be considered to be competing with private individuals to an unfair advantage,

because its services may be provided free of cost or subsidized by the tax base. Hinesburg Sand & Gravel v. Town of Hinesburg, 135 Vt 484 (1977).

Finally, plowing private roads may create additional liability for the town. When a municipality is acting in a private or proprietary manner, it may be held liable in the same way as a private corporation. Farmer v. Poultney School District, 113 Vt. 147 (1943). Regarding the issue of the Town of Colchester plowing a private road, if it negligently does so and a private individual is injured as a result, the town could be held liable as any private corporation. Id. In contrast, when a municipality acts in its governmental capacity by plowing public roads and someone is injured by the town's negligence, sovereign immunity will apply in most cases.

I hope you find this information helpful. If you require further assistance, please do not hesitate to call.

Very truly yours,



Deborah L. Markowitz, Esq.

Director, VLCT Municipal Law Center



ROESLER, WHITTLESEY, MEEKINS & AMIDON

Attorneys At Law

Robert C. Roesler
Richard C. Whittlesey
Marsha Smith Meekins
Edwin H. Amidon, Jr.
Anne Corbett Moore

P.O. Box 488
400 Financial Plaza
Burlington, VT 05402

(802) 864-7500
Fax (802) 863-9778

March 31, 1995

Bryan K. Osborne
Director of Public Works
Town of Colchester
P.O. Box 55
Colchester, Vermont 05446.

Re: Opinion No. 95-1

Dear Bryan:

I have reviewed your letter dated February 28, 1995, together with the enclosures, related to the Town plowing private roads. In general, I concur with the legal opinions and warnings to municipalities regarding this issue.

By way of background, I understand that the Town has for a number of years plowed private roads in the Town at the request of landowners whose property is served by these roads. I further understand that the voters of Colchester have previously voted in referendum on whether the Town should plow private roads. As a general rule, because highway maintenance is a matter within the discretion of the Selectboard, the voters do not have any legal authority to make decisions regarding highway matters. Thus, if the Board is acting within the scope of its authority, any such vote would be purely advisory and nonbinding on the Board. Likewise, if the Board (the Town) in plowing private roads is acting beyond or outside its lawful authority, notwithstanding voter approval, the expenditure of public funds for private purposes is subject to a legal attack by a taxpayer.

It is a generally recognized principal of municipal law that a municipal corporation cannot expend public monies except for public purposes. McQuillin, Municipal Corporations, Section 39.19. If the primary objective of a town expenditure is to promote some private end, the expenditure is illegal even though it may incidentally serve some public purpose. On the other hand, "if the primary object is to subserve a public municipal purpose, it is immaterial that, incidentally, private ends may be advanced." Id at Section 39.19.

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Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all, or at least a substantial part of the inhabitants or residents. Otherwise stated, the test of a public purpose should be whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit.

Id. Section 39.19

In Vermont, it is the law that a municipal corporation is a creature created by the legislature and possesses only such powers or rights as are expressly granted to it by the legislature or fairly implied in or incident to those expressly granted powers. Thus a power or right although not expressly stated, may be inferred because it is necessary to carry an expressed power into effect. Keleher v. New England Telephone & Telegraph Company, 755 F. Supp. 117, 118(D.Vt 1991); E.B. & A. C. Whiting, 106 VT. 446 (1934).

Furthermore, if there exists any ambiguity as to whether a municipality possesses authority for a given act, the courts will generally construe the grant of authority narrowly against the municipality. Central Vermont Quality Services, Inc. v. City of Rutland, 780 F. Supp. 218 (D.Vt.1991); Valcour v. Village of Morrisville, 104 VT. 119, 130(1932).

Accordingly, in summary, unless there is specific authority in the charter or the state statute expressly authorizing the municipality to perform a certain act, or the performance of such an act by the municipality is necessary in the furtherance of a specifically expressed grant of authority, or is incidental to and in furtherance of a clearly public purpose, the Town lacks the authority to so act. As a general rule, the expenditure of public monies to benefit private entities violates the above stated principle of law and may subject the Town to a law suit by a taxpayer or taxpayers. Such a suit would typically seek a court order prohibiting the use of municipal employees, equipment, and funds for the private benefit.

There may be some exceptions to the foregoing. For example, if in an emergency a town department needed to obtain access to private property for public safety reasons and couldn't negotiate the private road, the Town might be called in to clear the way for that limited purpose. Or, as Attorney Sperry mentions, the washout of material from a private roadway onto a Town highway might justify the maintenance of the private roadway, but only to the extent necessary to prevent further

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damage to the Town highway or interference with travel on the public way. In each case, the work on the private roadway is necessary for the maintenance of public health and safety.

With respect to references to the Town impliedly accepting a private roadway as a public roadway by such maintenance, I do not see this as a real threat. The law in Vermont concerning the conversion of a private way to a public way requires certain procedural steps including dedication by the owner and acceptance by the municipality, and typically is evidenced by a definitive act of conveyance.

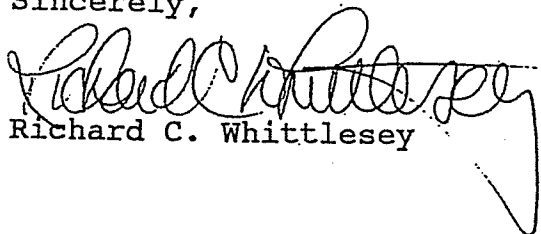
I do have concerns regarding potential liability for damage to persons or property arising out of the Town's maintenance or lack thereof of a private roadway over which it has exercised some maintenance function. Although a town has only the obligation to maintain public ways, assuming such a responsibility on a public road carries with it the accompanying obligation to properly perform that which the town has undertaken. The failure of proper performance gives rise to potential liability which may or may not be covered by the town's insurance. I would concur that where the Town maintains a private road, the Town will not be protected under the doctrine of sovereign immunity.

Finally, the Hinesburg Sand and Gravel case clearly states that it is unlawful for a town to operate a gravel pit processing and selling eight times the town's gravel needs in tax free competition with others and realizing annual profits. Although here, the Town of Colchester makes no money from plowing private roads, it is taking business away from private snow plowers and may render the Town vulnerable to attack by those hurt by such practice.

In short, it is the opinion of this office that plowing private roads is outside the scope of the municipality's authority. Even though prior voters may have approved this practice, such a vote does not insulate the Town from a suit filed by a taxpayer.

I hope that this opinion has been responsive to your inquiry. If you have any questions, please do not hesitate to contact me.

Sincerely,


Richard C. Whittlesey

RCW\srw

